IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
William C. Whitbeck, Presiding Judge

MARY BAILEY
Plaintiff-Appellee,

v

Supreme Court No. 125110
Court of Appeals No. 243132
Lower Court No. 01-000076

OAKWOOD HOSPITAL AND MEDICAL CENTER
Defendant-Appellant,

and

SECOND INJURY FUND
Defendant-Appellee,

and

DIRECTOR OF THE WORKERS' COMPENSATION AGENCY
Intervenor-Appellee.

BRIEF ON APPEAL – AMICUS CURIAE
ACCIDENT FUND INSURANCE COMPANY OF AMERICA

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JURISDICTIONAL STATEMENT

MCL 418.861a (14) provides that the Supreme Court shall have the power to review questions of law involved in any final order of the Workers Compensation Appellate Commission. MCR 7.301(A)(2) provides that the Supreme Court has jurisdiction to review a decision of the Court of Appeals.

QUESTION PRESENTED FOR REVIEW

I

DID THE COURT OF APPEALS COMMITT LEGAL ERROR IN *ROBINSON* V *GENERAL MOTORS CORP*, 242 MICH APP 331 (2000), *VALENCIC* V *TPM, INC*, 248 MICH APP 601 (2001), AND THE INSTANT CASE, *BAILEY* V *OAKWOOD HOSPITAL AND MEDICAL CENTER*, 259 MICH APP 298 (2003), BY CONCLUDING THAT MCL 481.925(1) REQUIRES THE DISMISSAL OF THE EMPLOYER'S CLAIM AGAINST THE SECOND INJURY FUND WHEN THE EMPLOYER DOES NOT GIVE TIMELY NOTICE TO THE SECOND INJURY FUND THAT IT MIGHT BE RESPONSIBLE FOR PAYMENT OF WORKERS COMPENSATION BENEFITS TO A VOCATIONALLY HANDICAPPED EMPLOYEE.

The answer of the plaintiff to this question is not known.

The defendant-appellee Second Injury Fund will contend that the answer is "No."

The answer of intervenor-appellee Director of the Bureau of Workers' and Unemployment Compensation presumably is "No."

The answer of *amicus curiae* Munson Hospital is "Yes."

The *amicus curiae* Accident Fund Insurance Company of America contends that the answer is "Yes."

STATEMENT OF FACTS

With minor changes only, this Statement of Facts is the same as the Statement of Facts in the brief of *amicus curiae* Munson Hospital. Page references noted refer to the Appendix filed by Defendant-Appellant. It is not necessary to read this statement of facts in order to follow the argument in this brief.

Plaintiff-appellee Mary Bailey (Employee) was certified as vocationally disabled by the Department of Education of the State of Michigan, hired by defendant-appellant Oakwood Hospital and Medical Center (Employer), and received a personal injury arising out of and in the course of employment. (35a) The Employee was then paid weekly workers' disability compensation and the costs of medical care by the Employer for more than the next fifty-two weeks. (35a) Later, the Employer suspended the weekly compensation believing that the Employee was avoiding remunerative employment. (35a)

The Employee then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation to reinstate continuing weekly compensation from the Employer. The Employer appeared and denied responsibility in a carrier's response. (35a)

The Bureau remitted the case to the Board of Magistrates for hearing and disposition. While the claim was pending before the Board, the Employer filed a claim that it was not responsible for any compensation after the first anniversary of the injury and that the benefits which were previously paid to the Employee must be reimbursed by defendant-appellee Second Injury Fund. (35a) The Fund appeared and asked that the Board dismiss the claim by the Employer for failing to give notice of the likelihood

that compensation may be payable beyond a period of 52 weeks after the date of injury received by the Employee as required by a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., MCL 418.925(1), second sentence. (35a)

The Board dismissed the claim by the Employer against the Fund with the determination that the Employer failed to give the Fund notice before the first anniversary of the injury that it was "likely" that compensation would continue after the first anniversary.

Bailey v *Oakwood Hosp and Medical Center*, unpublished order and opinion of the Board of Magistrates, decided on October 4, 1999 (Docket no. 100499041). (1a, 5a)

The Workers' Compensation Appellate Commission reversed and remanded the case to the Board with the mandate that the Board join the Fund as a party defendant. *Bailey* v *Oakwood Hosp & Medical Center*, 2000 Mich ACO #292. (6a, 11a)

On remand, the Board conducted an evidentiary hearing and granted the claim by the Employee but denied the claim by the Employer by ordering the Employer to pay the Employee the continuing weekly compensation and the costs of all medical care. *Bailey* v *Oakwood Hosp & Medical Center,* unpublished order and opinion of the Board of Magistrates, decided on February 5, 2001 (Docket no. 020501007). (13a, 22a-23a)

The Commission modified the decree of the Board by ruling that the Employer was not responsible for any compensation after the first anniversary of the personal injury that the Employee received. The decree of the Board dismissing the Fund was affirmed. *Bailey* v *Oakwood Hosp & Medical Center*, 2002 Mich ACO #185. (25a, 32a)

The Court of Appeals granted leave to appeal and allowed the director of the Bureau to participate as an amicus curiae, *Bailey* v *Oakwood Hosp & Medical Center*, unpublished order of the Court of Appeals, decided on November 14, 2002 (Docket no. 243132) (33a) and reversed and remanded to the Commission for a determination of the question about the accuracy of the decision by the Board that the Employee was not avoiding work which had been mooted by the decision of the Commission. *Bailey* v *Oakwood Hosp and Medical Center*, 259 Mich App 298, 306-307; 674 NW2d 160 (2003). (38a)

The Court granted leave to appeal and invited Munson Hospital to file a brief amicus curiae on the question of,

> ". . . whether the Court of Appeals properly interpreted MCL 418.921 and MCL 418.925 in *Robinson* v *General Motors Corp,* 242 Mich App 331 (2000), *Valencic* v *TPM, Inc,* 248 Mich App 601 (2001), and this case. In discussing this issue, the parties should consider the following: (1) whether the imposition of liability on the employer for paying benefits after 52 weeks of disability, in those situations where the Second Injury Fund does not receive statutory notice, is consistent with MCL 418.921's statement that the employer's liability 'shall be limited' to a 52-week period and that responsibility for all later benefits 'shall be the liability of the fund'; (2) whether MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the carrier, not the employer, affects the analysis of this issue; and (3) whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affects the analysis of this issue." *Bailey* v *Oakwood Hosp and Medical Center,* 470 Mich - ; - NW2d – (2004). (44a)

The Court said that other persons or groups interested in the determination of these issues may move for permission to file brief amicus curiae.

ARGUMENT

THE COURT OF APPEALS COMMITTED LEGAL ERROR IN *ROBINSON* V *GENERAL MOTORS CORP*, 242 MICH APP 331; 619 NW2d 441 (2000), *VALENCIC* V *TPM, INC*, 248 MICH APP 601; 639 NW2d 846 (2001), AND THE INSTANT CASE, *BAILEY* V *OAKWOOD HOSPITAL AND MEDICAL CENTER,* 259 MICH APP 298; 674 NW2d 160 (2003), BY CONCLUDING THAT MCL 481.925(1) REQUIRES THE DISMISSAL OF THE EMPLOYER'S CLAIM AGAINST THE SECOND INJURY FUND WHEN THE EMPLOYER DOES NOT GIVE TIMELY NOTICE TO THE SECOND INJURY FUND THAT IT MIGHT BE RESPONSIBLE FOR PAYMENT OF WORKERS COMPENSATION BENEFITS TO A VOCATIONALLY HANDICAPPED EMPLOYEE.

Introduction

This *amicus curiae* brief on behalf of the Accident Fund Insurance Company of America (hereafter the Accident Fund) is intended to supplement, not repeat, the arguments contained in the brief of *amicus curiae* Munson Hospital. This argument will first summarize the provisions of Chapter 9 of the Workers Disability Compensation Act (WDCA), which were intended to encourage employers to hire vocationally disabled persons. Then, because *Robinson* was the first reported case to interpret MCL 418.925(1), this brief quotes that portion of *Robinson* that sets forth the issue it considered, its reasoning, and its holding.

Next, this brief will discuss *Mercy Hospital* v *Crippled Children Comm.*, 340 Mich 405 (1954). The Accident Fund submits that the rules of statutory interpretation set forth in *Mercy* show how this Court dealt with provisions of an act that were remarkably similar to those in Chapter 9 of the WDCA. *Mercy* answers the third question posed by this Court in its order granting leave to appeal in this case. That question was whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affected the analysis of this appeal. The holding of *Mercy* supports the

conclusion that because there was no statutory penalty for a failure to provide timely notice, the notice provision was directory, not mandatory. *Robinson* should not have imposed a penalty that the legislature did not include in the statute.

This argument will conclude by briefly answering the two remaining questions posed by this Court when it granted leave to appeal in this case.

The provisions of Chapter 9 of the WDCA are designed to encourage employers to hire vocationally disabled persons.

The provisions of Chapter 9 of the WDCA were intended to encourage employers to hire vocationally disabled persons. The provisions, MCL 418.901 through MCL 418.941, reward an employer who hires a certified vocationally disabled person by limiting the employer's potential workers compensation liability to the disabled employee. Pursuant to MCL 418.921, if the disabled person is injured while working for the new employer, the employer is only responsible for workers compensation benefits accruing during the first 52 weeks after the date of injury. Thereafter, any workers compensation benefits owed to the employee are paid by the Second Injury Fund (SIF), a fund which is administered by the State of Michigan and is financed by assessments against workers compensation insurance companies and self-insured employers.[1]

MCL 418.911 provides that when an employer hires a certified vocationally disabled employee, the employer must provide certain information to the certifying

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[1] 418.921 states:

> A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund. The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319.

Footnote continued on next page.

agency. This section specifically states that the failure to provide the information to the certifying agency in a timely manner precludes the employer from the protection provided by the chapter.[2]

MCL 418.925 directs the employer to give notice to the SIF whether the employee is likely to be entitled to workers compensation benefits beyond a period of 52 weeks after the date of injury. This notice is to be given not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury.[3] Unlike the section of the chapter requiring the employer to give certain information to the certifying agency, the chapter does not set forth any adverse consequence to the employer for not giving notice to the SIF.

MCL 418.931 sets forth the procedure to be followed when a certified employee initiates a claim for workers compensation benefits. The employer can join the SIF but

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[2] MCL 418.911 states:

> Upon commencement of employment of a certified vocationally disabled person the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency. The certifying agency shall acknowledge receipt of the information. Failure to file the required information with the certifying agency within 60 days after the first day of the vocationally disabled person's employment precludes the employer from the protection and benefits of this chapter unless such information is filed before an injury for which benefits are payable under this act.

[3] MCL 418.925:

> (1) When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability.
> (2) If the fund does not notify the carrier of its intent to dispute the payment of compensation, the carrier shall continue to make payments on behalf of the fund, and shall be reimbursed by the fund for all compensation paid and pertaining to the period beyond 52 weeks after the date of injury. However at any time subsequent to 52 weeks after the date of injury, the fund may notify the carrier of a dispute as to the payment of compensation. The liability of the fund to reimburse the carrier shall be suspended 30 days thereafter until such controversy is determined.
> (3) The obligation imposed by this section on a carrier to make payments on behalf of the fund does not impose an independent liability on the carrier. After a carrier has established the right to reimbursement, payment shall be made promptly on a proper showing every 6 months. If a carrier does not make the payments on behalf of the fund, the fund may make the payments directly to the persons entitled to such payments.

Footnote continued on next page.

the fund can be dismissed by motion if the fund's argument and the evidence warrant dismissal.[4]

Robinson v *General Motors Corp*, 242 Mich App 331; 619 NW2d 441 (2000), interpreted MCL 418.925(1).

Robinson, the first reported case to consider the notice provision of MCL 418.925(1), set forth at 334-335 the issue it addressed and its holding:

> This case concerns the consequences of an employer's failure to give notice to the fund during the time period prescribed by section 925(1) of the WDCA where that provision is silent on the matter of consequences. The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature. *Drouillard v Stroh Brewery Co*, 449 Mich 293, 302; 536 NW2d 530 (1995). We conclude that the WCAC properly determined that the fund should be dismissed from the suit given GM's failure to comply with the statute. A plain reading of the statute reveals that the Legislature promulgated a mandatory notice requirement for employers to follow:
>
> > When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier *shall* notify the fund whether it

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[4] 418.931 states:

(1) If an employee was employed under the provisions of this chapter and a dispute or controversy arises as to payment of compensation or the liability therefor, the employee shall give notice to, and make claim upon, the employer as provided in chapters 3 and 4 and apply for a hearing. On motion made in writing by the employer, the director, or the worker's compensation magistrate to whom the case is assigned, shall join the fund as a party defendant.

(2) The bureau within 5 days of the entry of an order joining the fund as a party defendant shall give the fund written notice thereof by first-class mail which notice shall be mailed not less than 30 days before the date of hearing and shall include the name of the employee and employer and the date of the alleged personal injury or disability.

(3) The fund, named as a defendant pursuant to motion, shall have 10 days after the date of mailing of notice of joinder to file objection to being named a party defendant. On the date of the hearing at which the liability of the parties is determined, the worker's compensation magistrate first shall hear arguments and take evidence concerning the joinder as party defendant. If the fund has filed a timely objection, and if the argument and evidence warrant, the worker's compensation magistrate shall grant a motion to dismiss.

(4) At the time of the hearing, the employer and the fund may appear, cross-examine witnesses, give evidence, and defend both on the issue of liability of the employer to the employee and on the issue of the liability of the fund.

(5) The worker's compensation magistrate shall enter an order determining the respective liability of the employer and the fund.

> is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability. [MCL 418.925(1); MSA 17.237(925)(1) (emphasis added).]
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> The use of the word "shall" connotes a mandatory duty. *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 438; 591 NW2d 344 (1998). Moreover, we believe that the sanction of dismissal is necessarily implied from the statute. *McAvoy v H B Sherman Co,* 401 Mich 419, 460; 258 NW2d 414 (1977). Were it not, employers would be free to ignore the statutory requirements without fear of adverse consequences.
>
> Moreover, we note that, under the statute, the fund was entitled to review information regarding the accident and the nature and extent of the injury and disability. Presumably, if the employer fails to give notice or gives tardy notice of the fund's impending obligation, then the time during which the fund can review the carrier's information regarding the employee's accident, injury and disability is shortened.
>
> In short, although section 925(1) is silent on the consequences of an employer's failure to give notice to the fund during the time period prescribed by the statute, the WDCA properly construed the statute to find that dismissal of the fund as a party from this case was proper.

Robinson affirmed the decision of the WCAC that denied the employer reimbursement from the SIF.

If the rules of statutory construction set forth in *Mercy Hospital* v *Crippled Children Comm.*, 340 Mich 405; 65 NW2d 838 (1954) are followed, the lack of a statutory remedy for the failure to meet a deadline <u>does</u> affect the analysis of this case; the lack of a penalty for failure to give notice strongly suggests that no penalty was intended, particularly when another provision of the same Chapter of the WDCA sets forth a specific penalty for a missed deadline.

Mercy considered the interpretation of two sections of a statute that created the Michigan Crippled Children Commission and invested the commission "with authority to administer the act and to make agreements with hospitals for the furnishing of necessary care and treatment to afflicted children whose parents or guardian are unable to do so."

Section 14 of this statute (CL 1948, §722.314 [Stat Ann 1953 Cum Supp §25.422(14)]) included a specific penalty. According to *Mercy* at 407, Section 14:

> [A]fter setting forth provisions relating to the auditing and payment of bills rendered, contains the following:
>
> "Payment shall be refused on any billing rendered 60 days or more after the discharge of the patient from the hospital."

This section set forth the consequence to a hospital for submitting its bill late. If the bill was late, it was not paid.

Mercy Hospital had sought payment of medical bills totaling $6,602.25. Bills totaling $1,338.90 submitted in a timely fashion. Payment for the remaining $5,263.35 was requested by bills submitted after the 60-day deadline. *Mercy* at 406. *Mercy* at 408-409 said:

> Insofar as section 14 of the statute is concerned, there is no room for doubt as to the intention of the legislature. The language used is certain and definite. It is the duty of the courts to construe it as it reads, without reference to equitable considerations. *Bankers Trust Company of Detroit* v. *Russell, 263 Mich 677.*
>
> * * *
>
> Under settled rules of statutory construction the conclusion cannot be avoided that the requirement imposed by the legislature with reference to the submission of bills within 60 days after the discharge of patients is mandatory. Plaintiff's right of recovery is predicated on the statute, and it is bound accordingly. *Wolski* v. *Unemployment Compensation Commission*, 315 Mich 181. The trial court correctly determined that plaintiff was not entitled to recover for that portion of its claim not presented within the time limited.

Thus, *Mercy* held that the hospital could not recover the $5,263.35 requested by bills submitted 60 days or more after the discharge.

Section 8 of the statute (CL 1948, §722.308 [Stat Ann 1953 Cum Supp §25.422(8)]) set forth deadlines for the filing of admission and discharge reports but did

not specify a penalty for late filing as long as the reports were filed by the time the bill was paid. Section 8 stated:

> Hospital reports. Approved hospitals receiving patients under the provisions of this act shall promptly report to the commission on blanks to be provided by the commission for that purpose, the date and hour of admission to and discharge from such hospital . . . and such other information as the commission may require. Notification of the admittance of an afflicted child shall be made to the commission by the superintendent of the hospital within 10 days. A discharge report, giving the date of the discharge, and such other information as the commission may require, must be filed within 1 week from date of discharge. No bill for the care of a child shall be approved unless an entrance and discharge report has been filed with the commission.

The Crippled Children Commission argued that pursuant to Section 8, the commission did not have to pay the remaining bills of $1,338.90 because Mercy Hospital did not submit the admission and discharge reports to the commission within the respective number of days specified by the statute. *Mercy* said:

> It will be noted that section 8, above quoted in part, does not specify that a failure to make the entrance and discharge reports within the respective periods indicated therefor shall be given the effect of requiring the State officials concerned to refuse payment for services rendered in those cases as to which reports had not been so made, or that the failure of any hospital to so report shall be deemed to be a sufficient reason for declining to pay bills covering the treatment of the patients concerned. Rather, the requirement in this regard is that:
>
> > "No bill for the care of a child shall be approved unless an entrance and discharge report has been filed with the commission."
>
> If, as defendants and cross-appellants contend, the making of said reports within the respective periods indicated therefor is a condition precedent to the right to receive payment for services rendered, the sentence last quoted would be mere surplusage. Considering the pertinent provisions of the section together leads to the conclusion that the legislature did not intend that failure to give notice within 10 days of the admittance of an afflicted child or to file a report of discharge within a week thereafter would prevent payment for the care of those patients as to whom such reports were not made within the time specified. Had such been the intention we think it

would have been clearly set forth, in language comparable to that used in section 14. It is a fair inference that the actual purpose sought to be accomplished by the provisions of section 8 in question was the observance of a proper and orderly procedure in the handling of cases within the purview of the statute.

In *Fay* v. *Wood*, 65 Mich. 390, there was involved a construction of a provision of the charter of the city of Muskegon (a local act) directing that the council should on or before the first day of June in each year determine the amount necessary to be raised for highway purposes. The council did not act until after the date specified. In disposing of an objection that the time limited therefore by the local act was mandatory, it was said (p 401):

> "Statutes fixing a time for the doing of an act are considered as only directory, where the time is not fixed for the purpose of giving a party a hearing, or for some other purpose important to him."

In *Attorney General ex rel. Miller* v. *Miller*, 266 Mich. 127, 106 A.L.R. 387, certain provisions of the election law of the State were held to be directory only, the Court quoting with approval from 59 C.J. p 1074, Statutes § 631, as follows:

> " 'Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition.' "

See, also, *Motorcoach Operators Ass'n* v. *Board of Street Railway Commissioners*, 267 Mich. 568. The language of section 8 of the statute relating to the care of afflicted children may not be construed as barring recovery because of delay in filing the admittance and discharge reports. [*Mercy* at 499-411] [Emphasis supplied]

Thus the hospital was permitted to recover $1,338.90 even though the admission and discharge reports were not submitted within the time limits specified by Section 8.

The statute creating the Crippled Children Commission is similar to Chapter 9 of the WDCA in several ways. Both acts have a provision with specific language that

requires that something be done within a certain time limit or else the request for reimbursement will be denied. In the statute creating the Crippled Children Commission, it is Section 14 that states that the bills must be submitted in less than 60 days from the discharge from the hospital or else they would not be paid. In the WDCA, it is 418.911 that states that the employer must provide pertinent information to the certifying agency and that:

> Failure to file the required information with the certifying agency within 60 days after the first day of the vocationally disabled person's employment precludes the employer from the protection and benefits of this chapter unless such information is filed before an injury for which benefits are payable under the act.

For both of these sections, "there is no room for doubt as to the intention of the legislature"; if the deadline is missed, the legal entity can not collect from the state fund.

Both the statute creating the Crippled Children Commission and Chapter 9 of the WDCA have a provision that does specify a time period for performing some specific act but does not impose a penalty for a failure to timely perform this act. In the statute creating the Crippled Children Commission, it is Section 8 that states that the admission report must be filed with 10 days of the admission and the discharge report must be filed within 1 week from the date of discharge. No penalty is specified for the failure to meet these deadlines. In Chapter 9 of the WDCA, it is MCL 418.925(1) that says that:

> Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of the injury.

Mercy at 409-410 had said:

> Considering the pertinent provisions of the section together leads to the conclusion that the legislature did not intend that failure to give notice within 10 days of the admittance of an afflicted child or to file a report of discharge within a week thereafter would prevent payment for the care of those patients as to whom such reports were not made within the time specified. Had such been the intention we think it would have been clearly set forth, in language comparable to that used in section 14.

This compelling logic leads to the conclusion that because MCL 418.925(1) did not include language such as that found in MCL 418.911, the legislature did not intend that the carrier's failure to give the Second Injury Fund notice within the specified window should result in forfeiture of the carrier's right to the protection and benefits of Chapter 9. The notice provision of this section was directory, not mandatory. It was designed "with a view to the proper, orderly, and prompt conduct of business." Based upon the rules of statutory construction in Mercy, *Robinson* committed legal error by releasing the Second Injury Fund from its statutory obligations. Accordingly, *Robinson* should be overruled.

In those situations where the Second Injury Fund does not receive statutory notice, the imposition of liability on the employer for paying benefits after 52 weeks of disability is inconsistent with MCL 418.921's statements that the employer's liability "shall be limited" to a 52 week period and that responsibility for all later benefits "shall be the liability of the fund.

MCL 418.921 state's in relevant part:

> The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund.

MCL 418.911 is the only provision of Chapter 9 that affects the respective obligations of the employer and the Second Injury Fund. It provides in relevant part:

> Upon commencement of employment of a certified vocationally disabled person the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency . . . Failure to file the required information with the certifying agency within 60 days after the first day of the vocationally disabled person's employment precludes the employer from the protection and benefits of this chapter unless such information is filed before an injury for which benefits are payable under this act.

In this case, the employer did file the notice required by this section and, therefore, was not subject to the penalty set forth in MCL 418.911. That should be the end of the discussion. The only way around this conclusion is by doing what *Robinson* did, i.e., judicially legislate a penalty that the legislature elected not to include in the statute.

Robinson justified the creation of this penalty by noting that section 418.925(1) said that the carrier "shall" notify the Second Injury Fund. *Robinson* did not explain why the one shall in section 418.825(1) was more important than the two "shalls" in MCL 418.921. The Accident Fund submits that rules of statutory interpretation set forth in *Mercy* resolve this conflict of competing "shalls" by characterizing the notice provision in MCL 418.825(1) as directory, not mandatory.

The Accident Fund submits that there is one more important point about this discussion of "shalls". In *Bailey v Oakwood Hospital and Medical Center, 470 Mich 892 (2004)*, the Workers Compensation Appellate Commission (WCAC), when trying to show the illogical implications of *Robinson*, reached an illogical result itself. Apparently, the WCAC interpreted *Robinson* as negating the language of 418.921 that said that further compensation owed "shall be the liability of the fund" but retaining the language that the employer's liability "shall be limited to those benefits accruing during the period of 52 weeks after the date of injury." The effect of this interpretation is that the injured employee would not receive workers compensation benefits beyond the first

anniversary of her injury. This result is untenable. According to MCL 418.901, a vocationally disabled person is:

> ...a person who has a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes, and whose impairment is a substantial obstacle to employment....

The Accident Fund submits that, regardless what rules of statutory interpretation are used, the legislature did not intend to deny benefits to an injured employee whose only difference from other injured employees entitled to benefits is that she already had a substantial degree of impairment before she sustained her injury at work.

MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the does affect the analysis of this issue because it provides additional examples of the inequities caused by *Robinson*.

At pages 23-24 of its brief, *amicus curiae* Munson Hospital shows the manifest unfairness of *Robinson* by giving examples of instances when an employer would learn of an injury after the time had expired for giving the notice specified by MCL 418.925. Because MCL 418.925 requires the carrier to give this notice, in the case where the employer is not self-insured, the carrier is the insurance company and, therefore, the employer and the carrier are two separate entities. There can be instances where the employer knew of the injury but the carrier did not. This could occur when one carrier was paying benefits voluntarily, the injured worker returned to work, the employer changed workers compensation carriers, the employee went off work, the first carrier resumed the payment of compensation benefits, and, more than one year after the last day of work, the employee seeks and obtains a new injury date of his last day of work. The second carrier would now be liable for benefits. It could not give timely notice to the Second Injury Fund because it never knew the plaintiff existed until after the time for

giving notice to the Second Injury Fund had expired. This unjust result and the inequities listed in Munson's brief, are avoided if *Robinson* is overruled.

SUMMARY OF ARGUMENT

The provisions of Chapter 9 of the WDCA were designed to encourage employers to hire individuals with impairments. If the provisions of the chapter are applied as written, they work together to protect the interests of the injured employee, the employer, and the Second Injury Fund. By creating a penalty that the legislature did not include in the statute, *Robinson* unfairly denies employers the protection that the legislature intended as a reward for hiring impaired employees. The rules of statutory construction and policy considerations both dictate that *Robinson* be overruled.

RELIEF

WHEREFORE, *Amicus Curiae* Accident Fund Insurance Company of America respectfully requests that this honorable Court overrule the Court of Appeals' holding in *Robinson* and *Valencic* and reverse the Court of Appeals decision in *Bailey* because MCL 418.925(1) does not impose a penalty on a carrier that fails to give timely notice to the Second Injury Fund.

Respectfully submitted,

Dated: September 2, 2004

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